87-1175 (1)

No.____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1987

PARKER-HANNIFIN CORPORATION,
Petitioner,

v.

ANNIE C. KISER et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (Appeal No. 87-1023)

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42 pp

QUESTIONS PRESENTED

1. Whether federal pleading practice allows a plaintiff to add JOHN DOE defendants to an action originally filed in federal court pursuant to the limited grant of diversity jurisdiction, 28 U.S.C. 1331?

2. Whether the naming of JOHN DOE defendants necessarily defeats diversity jurisdiction?

3. Whether a plaintiff may affirmatively invoke federal diversity jurisdiction while utilizing a form of JOHN DOE pleading practice that is neither recognized nor allowed in the state in which the federal district court sits?

4. Under what circumstances may a circuit court reverse an otherwise proper Rule 12(h), Fed.R.Civ.P., dismissal of an amended complaint on the grounds that Rule 15(a), Fed.R.Civ.P., mandates that "justice" *requires* the allowance of a second amended complaint?

5. Whether the district court below, in fact, exercised its discretion and abused the same under 28 U.S.C. §1653 and Rule 15(a), Fed.R.Civ.P., or whether the court failed to exercise its discretion and committed reviewable prejudicial error?

LIST OF ALL PARTIES

The parties to the proceedings below were the petitioner-defendant Parker-Hannifin Corporation and the respondents-plaintiffs Annie C. Kiser and Annie C. Kiser as Administratrix of the Estate of Everett W. Kiser. Other named defendants, General Electric Corporation and Eaton Corporation, were dismissed in the trial court and were not parties to the appeal. They have no continuing interest in this matter.

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The petitioner Parker-Hannifin Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on October 14, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 831 F.2d 423 (1987), and is reprinted in the appendix hereto, *infra*.

The memorandum decision of the United States District Court for the Eastern District of Pennsylvania

(Weiner, J.) has not been reported. It is reprinted in the Appendix hereto, *infra*.

JURISDICTION

Respondents initially brought this tort suit in the Eastern District of Pennsylvania on December 5, 1985. Their original complaint blatantly failed to comply with the minimal requirements of Rule 8(a)(1), Fed.R.Civ.P., which requires a "short and plain statement of the grounds upon which the court's jurisdiction depends. . . ."

Despite being informed of this short-coming by a responsive pleading and by the court, and being allowed leave of court to amend pursuant to Rule 15(a), Fed.R.Civ.P., plaintiffs' first amended complaint again ran afoul of the express pleading requirements of Rule 8(a)(1), Fed.R.Civ.P., as well as Rule 9(a), Fed.R.Civ.P., which requires legal existence be pled "to the extent required to show the jurisdiction of the court."

Specifically, plaintiffs for the first time added JOHN DOE defendants of indeterminate citizenship and failed to allege Parker-Hannifin's citizenship for diversity purposes. These shortcomings, once again, improperly left the question of diversity jurisdiction unsettled. *See, Strawbridge v. Curtiss*, 7 U.S. (3 Cr.) 267 (1806) (complete diversity required).

Again, through the inadvertence of counsel this first amended complaint was not properly served on defendants in contravention of Rule 5(a), Fed.R.Civ.P., which requires that "every pleading subsequent to the original complaint. . . be served upon a party. . . ." *See also*, Rule 11, Fed.R.Civ.P.

It should be noted that the first amended complaint identified three possible non-JOHN DOE defendants: Parker-Hannifin, Eaton, and General Electric. Defendant Eaton first moved to dismiss on the ground that the

complaint failed to adequately allege the basis of jurisdiction. Parker-Hannifin joined in the motion. On February 12, 1986, the court directed counsel to submit briefs on the potentially dispositive issues of the government specifications defense and the *Feres* doctrine. According to respondents, the court then informed counsel that plaintiffs need not respond to the motions to dismiss pending further notice from the court. Allegedly these instructions are reflected in a confirming letter from Eaton's counsel to the court with copies to other counsel.

On June 11, 1986, the court granted the motions of Eaton and Parker-Hannifin for insufficient jurisdictional allegations. General Electric had also moved to dismiss for failure to state a cause of action against it. That motion was also granted on the ground that plaintiffs had failed to file an opposing brief. In August 1986, plaintiffs appealed from the order reinstating the June 11, 1986, dismissal as per the court's order of July 11, 1986. That appeal (No. 86-1514) was dismissed for failure to follow appellate rules.

In response to the above mentioned dismissal orders, plaintiffs' counsel then requested the trial court vacate the same. There followed a telephone conference call among counsel and the court on July 2, 1986, which resulted in entry of an order on July 11, 1986, vacating the order entered June 11, 1986, granting the motions to dismiss of Eaton and Parker-Hannifin; memorializing Plaintiffs' stipulation to dismiss with prejudice of all claims against Eaton and General Electric; and, ordering Plaintiffs and Parker-Hannifin to spend 30 days from July 2nd attempting to resolve plaintiffs' claim that diversity jurisdiction is proper:

> ". . . in the event of a failure by plaintiffs and Parker-Hannifin Corporation to reach agreement on this issue, it is Stipulated and Agreed that defendant, Parker-Hannifin Corporation

> may move the Court upon the end of the said thirty (30) day period for reinstatement of the Order dismissing the Complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction and/or lack of properly pleading the existence of diversity jurisdiction."

On or about August 28th Parker-Hannifin moved pursuant to the July 11 order to reinstate the dismissal order. Plaintiffs' opposed the motion. On September 23, 1986, the district court filed its opinion and order by which it granted Parker-Hannifin's motion to reinstate the initial dismissal order and dismissed the complaint as to Parker-Hannifin:

> ". . . Plaintiffs have not attempted to refute Parker-Hannifin Corporation's allegation that the parties were unable to resolve the diversity issue. Pursuant to paragraph three of the stipulation, we, therefore, reinstate that part of our Order dated June 9, 1986 dismissing the complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction."

Plaintiffs moved for reconsideration of the second dismissal order and again moved for leave to amend the complaint. Submitted with the motion was a proposed second amended complaint which added the statement that appellee is incorporated in the State of Ohio. On December 11, 1986, the court rendered its opinion and order denying reconsideration and affirmed the order of dismissal:

> ". . . We based our decision on the fact that since the parties were unable to resolve the diversity issue by August 2, 1986, we were unable to establish jurisdiction under the diversity statute. . ."
>
> ". . .We note that paragraph three of the stipulation which was entered as the order of the

> court on July 11, 1986, specifically states that the parties' *shall* have thirty (30) days from the date of July 2, 1986, conference within which to attempt to resolve plaintiff's claim that diversity jurisdiction is proper" (emphasis added).
>
> "The use of the word 'shall' indicates that the 30 day time limit was intended to be mandatory, not permissive. Since plaintiff brought this action the burden was on her to establish diversity jurisdiction over Parker-Hannifin Corporation by the August 2, 1986 deadline. . . .".

On January 9, 1987, plaintiffs filed their notice of appeal from the order of December 12, 1986, affirming the prior order. Despite the prior dismissal of No. 86-1514,[1] the circuit court assumed jurisdiction from the December dismissal order under 28 U.S.C. §1291, inasmuch as the trial court dismissed plaintiffs' complaint as

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1. The circuit court rejected Petitioner's argument below that it could not have appellate jurisdiction over this matter because a previous appeal (86-1514) of the district court action had been dismissed and the case was marked *dismissed*. The Docket entries state on September 11, 1986, the following:

> Certified Copy of Order received from U.S. Court of Appeals that the case is dismissed for failure to order a transcript of the proceedings in the Lower Court as required, filed. 9/12/86 entered.

Because respondent had failed to properly comply with the local rules, their first appeal was properly dismissed. See *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404 (3rd Cir. 1980); *Abood v. Block*, 752 F.2d 548 (11th Cir. 1985); *Southwest Administrators, Inc. v. Lopez*, 781 F.2d 1378 (9th Cir. 1986); *Thomas v. Computax Corp.*, 631 F.2d 139 (9th Cir. 1980); *Chavez v. U.S.*, 219 F.2d 948 (5th Cir. 1955). The circuit court could not assume jurisdiction over a case that has already been dismissed by the same court.

to Parker-Hannifin, the sole remaining determinate defendant, and denied plaintiffs' application for leave to amend.[2]

Pursuant to 28 U.S.C. §1254, the Supreme Court may review by writ of certiorari the judgment of the lower federal circuit court. This is especially important here because of the split in the circuits regarding JOHN DOE practice, and the resulting scope of diversity jurisdiction.

STATUTES INVOLVED

This writ raises important questions about the scope of 28 U.S.C. §1331 (diversity jurisdiction), as well as the proper construction of Rules 8(a)(1), 12(h) and 15(a), Fed.R.Civ.P.[3]

STATEMENT OF THE CASE

This action was brought by or for the parents of Tony E. Kiser, deceased, to recover damages for his alleged wrongful death. Tony Kiser was single and without children. The action is brought by his mother in her own right and as administratrix of the estate of decedent's father, who died in December 1984. The decedent was on active duty in the United States Navy on board the USS Guam in a war zone off the coast of Lebanon. He allegedly died from injuries caused by the failure and/or malfunction of a cylinder which had been

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2. The circuit court either treated the JOHN DOE defendants as dismissed, or as irrelevant. *See Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984) ("If an action is dismissed as to all of the defendants who have been served and only unserved defendants remain, the district court's order may be considered final under [28 U.S.C. §1291] for the purpose of perfecting an appeal.").

3. The Federal Rules of Civil Procedure and Appellate Procedure set forth mandatory requirements for all litigants. The Federal Rules have the force and effect of statutes. *See*, 28 U.S.C. §§2071-72.

manufactured according to specification and government contract for the Navy and installed on the USS Guam. The Navy's blueprints indicate that the cylinder was manufactured and supplied by the Miller Fluid Power Corporation of Bensenville, Illinois.

Because of seemingly insurmountable problems, strong defenses, and absolute immunities, plaintiffs will likely never recover, even assuming liability. *E.g., Feres v. United States*, 340 U.S. 135 (1950) (immunity); *Yearsly v. Ross Construction Co.*, 309 U.S. 18 (1940) (government contractor defense); *In re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046, 1055 (E.D.N.Y. 1982) (same); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 249, 250 n.9 (3rd Cir. 1982) (same; applying Pennsylvania law); *Marker v. Universal Oil Products Co.*, 250 F.2d 603 (10th Cir. 1957) (sophisticated user defense as construed pursuant to RESTATEMENT (SECOND) OF TORTS, §388). This at least was the unequivocal view of the trial court.

Even though the Navy blueprints make clear that Parker-Hannifin could not have been responsible, plaintiffs seem to have erred and named the wrong defendant. Since they are too late to sue the Miller Fluid Power Corporation, they insist on pressing forward against Parker-Hannifin, despite irrefutable contrary evidence of non-liability.

Despite the ultimate frivolousness of their claim, the trial court allowed plaintiffs an opportunity to amend, pursuant to Rule 15(a) Fed.R.Civ.P. Then pursuant to Rule 12(h), Fed.R.Civ.P., the court gave plaintiffs another chance to try to present legitimate claim as to Parker-Hannifin. Not only did they fail to do this, as required by Rule 8(a)(1), Fed.R.Civ.P., but they made matters worse by adding JOHN DOE defendants. In light of this, the court properly fulfilled its obligations to dismiss.

REASONS FOR GRANTING THE WRIT

THERE IS NO PROVISION IN THE FEDERAL RULES TO ALLOW A PARTY TO ADD JOHN DOE DEFENDANTS TO AN ACTION ORIGINALLY FILED IN FEDERAL COURT PURSUANT TO THE LIMITED GRANT OF DIVERSITY JURISDICTION, 28 U.S.C. §1331

Petitioner is unaware of any case that would allow a plaintiff to amend to add JOHN DOE defendants to an action originally filed in federal court under diversity jurisdiction. The Federal Rules of Civil Procedure do not provide for suing fictitious parties. Indeed, the practice is inconsistent with many of the federal rules and incompatible with federal procedure. See, e.g., Fed.R.Civ.P. 10(a) ("[i]n the complaint the title of the action shall include the names of all the parties. . . ."). Such pleadings, although perhaps unavoidable in an action removed pursuant to 28 U.S.C. §1441 have no place in an original federal action.[4]

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4. The question of JOHN DOE plaintiffs can arise in original federal pleadings, as is the case here, or in the context of removal jurisdiction cases under 28 U.S.C. §1441, as was the case in *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987). Although control of 28 U.S.C. §1331 jurisdiction mandates vigilance in both contexts, it is hard to see why the federal courts should ever tolerate original JOHN DOE pleadings in diversity cases in districts located in states that don't recognize JOHN DOE pleadings. *See, Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957). Perhaps these JOHN DOES have some place in California state practice. But, it is inconceivable that they serve any purpose when they are included superstitiously and without reason in non-JOHN DOE states.

Even in JOHN DOE jurisdictions, the JOHN DOES do not survive in federal court. When a diversity case is initially filed in federal court, Rule 15(c), Fed.R.Civ.P. clearly supersedes state law on relation back. *See, e.g., Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 738-39 (9th Cir. 1982); *Britt v. Arvantis*, 590 F.2d 57, 61-62 (3d Cir. 1978). Arguably, this Court might feel a need to distinguish the propriety of the presence of JOHN DOE pleadings in removal cases from original actions. E.g., *Bryant v. Ford Motor Co.*, 832 F.2d at 1087 (Kozinski, J., dissenting).

THERE IS A NEED TO RESOLVE THE CONFLICT IN THE CIRCUITS ON WHETHER THE NAMING OF JOHN DOE DEFENDANTS DEFEATS DIVERSITY JURISDICTION

This Honorable Court must resolve the conflict in the circuits on the proper disposition of JOHN DOE pleadings in a diversity action. Specifically, even assuming that JOHN DOE pleadings are allowable under some limited circumstances, plaintiffs should not be allowed to add JOHN DOE defendants in a diversity action. Consistent with Rule 11, Fed.R.Civ.P., how can a plaintiff allege both that someone unknown is also culpable, but is a diverse someone?

There is no doubt that, without more, JOHN DOE defendants destroy diversity jurisdiction. *C.f., Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939) (named defendant bound to show unnamed JOHN DOE defendant a nonresident to justify removal). Under diversity law the citizenship of these JOHN DOE defendants are unknown and thus diversity cannot be properly alleged. *E.g., Abels v. State Farm Fire and Casualty Co.*, 770 F.2d 26 (3rd Cir. 1985). There can be no subject matter jurisdiction over this matter as long as JOHN DOE defendants ONE through FIVE are present in this action. The only question is whether the courts should follow the mandate of Rule 12(h), Fed.R.Civ.P., and dismiss complaints with JOHN DOE allegations, *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987) (en banc), or instead should rewrite or blue pencil complaints to preserve diversity, *Kiser v. General Electric*, 831 F.2d 423, 426 n.6 (3rd Cir. 1987).

JOHN DOE PLEADINGS MAY NOT BE USED WHEN INVOKING DIVERSITY JURISDICTION IN A FORUM STATE THAT DOES NOT RECOGNIZE SUCH PLEADINGS AS A MATTER OF STATE LAW

Since federal practice has absolutely no place for JOHN DOE pleadings in complaints in jurisdictions in which there is no state JOHN DOE law, it should be abolished forthwith.

The Commonwealth of Pennsylvania does not recognize JOHN DOE pleadings. Even assuming that in those states in which such pleadings are allowed, e.g., Cal.Civ.Proc. Code §474 (West 1979), federal court pleading rules may suffer modification in the spirit of federalism, there is no reason a federal district court sitting in Pennsylvania need accept such pleadings.

Hanna v. Plumer, 380 U.S. 460 (1965) addressed the question of what happens when there is a conflict between state law and the Federal Rules of Civil Procedure. It holds that if there is a direct conflict between the Federal Rules and state law, the Federal Rule takes precedence unless the Federal Rule is invalid:

> It is true that both the [Rules] Enabling Act [28 U.S.C. §2072] and the *Erie* [*R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938)] rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their prima facie judgment that the

> Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

380 U.S. at 471 (emphasis added; footnote omitted). See generally 3 J. Moore, *Moore's Federal Practice* para. 15-15[2], at 15-142 (2d ed. 1985) ("*Hanna v. Plumer* is dispositive of the issue and . . . the matter is . . . one solely of federal practice under Rule 15(c)") (footnote omitted). *See also, Burlington Northern R.R. v. Woods*, 107 S.Ct. 967 (1987).

A TRIAL COURT HAS AN ABSOLUTE RIGHT TO DISMISS AN ORIGINAL JOHN DOE COMPLAINT FOR WANT OF DIVERSITY AND "JUSTICE" DID NOT MANDATE THE ALLOWANCE OF A SECOND AMENDED COMPLAINT

Neither parties nor circuit courts may create subject matter jurisdiction where none exists. Without federal subject matter jurisdiction, an action must be dismissed at any time, with or without motion of the parties. Rule 12(h)(3), Fed.R.Civ.P., clearly states: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (emphasis added).[5] In the instant case, the trial court followed this absolute rule.

The Third Circuit and the trial court agree that plaintiffs amended complaint failed to allege subject matter jurisdiction in diversity, 28 U.S.C. §1332, due to the grossly improper JOHN DOE pleadings, and the failure to allege the principal place of business of Petitioner Parker-Hannifin.

Rule 15(a), Fed.R.Civ.P., makes clear that where, as here, a party has already amended its complaint *and* a responsive pleading has been served, then that "party

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5. This rule continues former 28 U.S.C. §80 (dismissal or remand of action over which district court lacks jurisdiction).

may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[6] According to the *Notes of the Advisory Committee on Rules* (1963 Amendments), "the court has discretion to permit a supplemental pleading . . . in light of particular circumstances . . . and if so, upon what terms." What the circuit court is saying is that the trial court read "the circumstances" wrong.

Nevertheless, the circuit court *found* that the trial court erred in dismissing plaintiffs' claim for want of subject matter jurisdiction. The only basis for this extreme repudiation of Rule 12(h), Fed.R.Civ.P., is that in effect, under Rule 15(a), Fed.R.Civ.P., the trial court abused its discretion and should have granted a mandatory second right to amend the Complaint. The circuit then said that there must be diversity, since the circuit automatically blue pencils the John Doe allegations, and improperly finds outside the record that the Kisers were factually correct in claiming that diversity jurisdiction existed. See *Fassett v. Delta Kappa Epsilon, et al.*, 807 F.2d 1150, 1165 (3rd Cir. 1986) (any attempt to supplement the record is improper because the appellate court may only consider matters on the record below).

Although the findings outside the record are improper, the circuit court's lack of deference to the trial court is more puzzling. In *Bamm, International v. GAF Corp.*, 651 F.2d 389 (5th Cir. 1981), the court stated in part:

> In deciding whether to grant leave to amend the district court must take into account several factors "such as undue delay, bad faith or dilatory motive on the part of the movant, *repeated failure to cure deficiencies by amendments previously allowed, undue prejudice* to

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6. Rule 15, Fed.R.Civ.P., continues old 28 U.S.C. §1653, formerly §399 (amendments to show diverse citizenship).

> the opposing party by virtue of allowance of the amendment, futility of the amendment. . ." 651 F.2d at 391; Also see *Foman v. Davis*, 371 U.S. 178 (1962).

The plaintiffs have had over a year to amend their complaint. It is still not correct and ultimately the second amended complaint did not resolve the JOHN DOES problem. This is clearly contrary to the requirements for proper averments of diversity. The "DOES" have unknown citizenship and therefore diversity is not present. See, *Abels v. State Farm Fire and Casualty Co.*, 770 F.2d 26 (3rd Cir. 1985); *Carlsberg Resource Corp. v. Cambria Savings and Loan*, 554 F.2d 1254 (3rd Cir. 1977).

The trial court gave the plaintiffs several opportunities to amend their complaint and now over a year later the complaint still did not properly allege diversity. Ultimately, the amendment may be found to be futile if the cylinder, which is alleged to be defective, was manufactured by another company pursuant to U.S. Navy specifications.

THE COURT DID NOT ABUSE ITS DISCRETION AND HAD A VALID REASON FOR DENYING LEAVE TO AMEND

On several occasions the plaintiffs have been given the opportunity to amend their complaint, and that responsibility rests with the plaintiffs alone. *E.g., DeVargas v. Montoya,* 796 F.2d 1245 (10th Cir. 1986). To date the plaintiffs have yet to properly allege diversity.

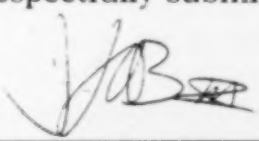
How much time must a party be given to amend its pleading? In the present case, the plaintiffs were given from February 13, 1986 to June 11, 1986. The District Court dismissed this action on three occasions June 9, 1986, September 23, 1986, and December 11, 1986, and relented twice to give respondents another chance. The

trial court has been generous, but at some point a final decision must be made.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Most important, this Honorable Court should resolve the conflict in the circuits regarding JOHN DOE pleadings, even assuming they have a place in federal practice, at least to the extent that it concerns the limited grant of diversity jurisdiction, 28 U.S.C. 1331.

Respectfully submitted,



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January 12, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1023

KISER, ANNIE C. and
KISER, ANNIE C. as Administratrix of
the Estate of KISER, EVERETT W.

Appellant

v.

GENERAL ELECTRIC CORPORATION
PARKER-HANNIFIN CORPORATION and
EATON CORPORATION and
DOES 1-5

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 85-6997)

Argued July 6, 1987

Before: HIGGINBOTHAM and BECKER, *Circuit Judges*,
and BARRY, *District Judge*.*

(Filed October 14, 1987)

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* Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This appeal concerns a district court order that affirmed its prior order dismissing a complaint without first considering appellant's request, or her subsequent motion, for leave to amend her complaint. We find that the district court should have granted appellant's request or her motion for leave to amend, and that the district court thus acted improperly when it dismissed the complaint without even addressing appellant's request or motion to amend. Accordingly, we will reverse the order of dismissal and remand to the district court with directions to grant leave to amend the complaint to include an allegation that appellee-corporation's state of incorporation is Ohio.

I.

This action was brought by the parents of Tony W. Kiser, deceased, to recover damages for his allegedly wrongful death.[1] The initial complaint, filed December 5, 1985, alleged that the decedent, while on active duty as a fireman in the United States Navy, was killed on February 23, 1984, aboard the U.S.S. Guam, which was then stationed in the Mediterranean Sea off the coast of Lebanon. He died from injuries allegedly caused by the failure and malfunction of certain component parts of a hatch that allegedly had been manufactured by the defendants, sold to the Navy and installed on the U.S.S. Guam.

The initial complaint failed adequately to allege the basis of the district court's diversity jurisdiction. On February 6, 1986, then-defendant Eaton Corporation ("Eaton") moved to dismiss the complaint for that reason. On February 11, 1986, appellee Parker-Hannifin Corporation ("Parker-Hannifin") joined Eaton's motion to dismiss. Thereafter, on February 12, 1986, the district court held a telephone conference with counsel for the parties. Counsel for appellant Annie C. Kiser ("Kiser") was informed at that time that, pending further notification from the court, the pending motions of Eaton and Parker-Hannifin required no immediate response from her.[2]

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1. The decedent's father, Everett W. Kiser, died on December 18, 1984. Appellant Annie C. Kiser maintains this action as the mother of the decedent and as the duly-appointed administratrix of her husband's estate.

2. A letter to the district court from Leonard A. Busby, Esquire, attorney for Eaton, dated February 13, 1986, stated in relevant part: "Your Honor . . . informed counsel [during the telephone conference] that the pending Motions of Eaton Corporation and Parker-Hannifin on the grounds that the Complaint does not properly allege the basis for jurisdiction need not be responded to by plaintiffs pending further notification from Your Honor."

One week later, on February 19, 1986, Kiser filed an amended complaint where she again failed specifically to allege the state of incorporation of Parker-Hannifin. The amended complaint did, however, allege that Parker-Hannifin was not a North Carolina corporation.[3] It also added as defendants John Does one through five, who were alleged not to be incorporated, nor to have their principal places of business, in North Carolina. On March 27, 1986, Parker-Hannifin filed its answer. Notwithstanding the district court's direction that Kiser could defer any response to the pending motions, the district court thereafter granted those motions of Parker-Hannifin and Eaton to dismiss the amended complaint for insufficient jurisdictional allegations. *Kiser v. Parker-Hannifin Corp.*, No. 85-6997, mem. op. at 2 (E.D. Pa. June 9, 1986).

By letter dated June 24, 1986, Kiser's counsel asked the district court to vacate its dismissal order, referring to the district court's February 12th directive deferring consideration of the motions to dismiss. There followed another telephone conference involving counsel and the district court on July 2, 1986, which resulted in an order vacating the dismissal order of June 9, 1986,[4] and stipulating to dismissal with

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Appendix for Plaintiffs-Appellants at 34a. Neither the district court nor counsel has suggested that this letter does not recount accurately the district court's directive on this jurisdictional issue.

3. Kiser is a citizen of North Carolina.

4. Because the record shows that the district court, on February 12, 1986, informed Kiser's counsel that Parker-Hannifin's pending motion to dismiss did not need to be answered pending further notification from the court, and because no such notification was ever given, we conclude that the initial dismissal order of the district court was inadvertent. Apparently recognizing this oversight, the district court properly vacated that dismissal order.

prejudice on her claims against Eaton and then-defendant General Electric Corporation. *Kiser v. Parker-Hannifin Corp.*, No. 85-6997, stipulation & order at 1 (E.D. Pa. July 11, 1986). In addition, this stipulation and order provided that:

> 3. Plaintiffs and Defendant, Parker-Hannifin Corporation shall have thirty (30) days from the date of [the] July 2, 1986 conference within which to attempt to resolve plaintiffs' claim that diversity jurisdiction is proper; in the event of a failure by plaintiffs and Parker-Hannifin Corporation to reach agreement on this issue, it is Stipulated and Agreed that defendant, Parker-Hannifin Corporation may move the Court upon the end of the said thirty (30) day period for reinstatement of the Order dismissing the Complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction and/or lack of properly pleading the existence of diversity jurisdiction.

Id. at 1-2.

Kiser's counsel then attempted to obtain consent to allow her to amend the complaint to allege that Parker-Hannifin's state of incorporation is Ohio.[5] Parker-Hannifin, however, would not consent to this amendment. Appendix for Plaintiffs-Appellants ("App.") at 151a ¶ 17. On August 28, 1986, Parker-Hannifin moved to reinstate the June 9th dismissal order, and, on September 12, 1986, Kiser

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5. Kiser's Motion for Reconsideration of Court's Order Dismissing the Complaint and for Leave to Amend the Complaint alleges that, "[b]etween July 11, 1986 and August 2, 1986[, her] counsel and counsel for defendant, Parker-Hannifin, agreed that defendant's counsel would attempt to obtain the consent of his client for [Kiser] to amend her complaint to allege defendant's place of incorporation." App. at 133a ¶ 16. Parker-Hannifin's answer to this motion admits the same. *See* App. at 151a ¶ 16.

filed its opposition to this motion and requested leave to amend her complaint. On September 23, 1986, the district court granted Parker-Hannifin's motion on the basis of paragraph three of the July 11th stipulation. *Kiser v. Parker-Hannifin Corp.*, No. 85-6997, mem. op. at 4 (E.D. Pa. Sept. 23, 1986). The district court did not mention, and, thus, apparently did not consider, Kiser's then-pending request for leave to amend her complaint.

On October 8, 1986, Kiser moved for reconsideration of the second dismissal order and, again, for leave to amend her complaint. This motion was accompanied by a proposed second amended complaint stating that Parker-Hannifin is an Ohio corporation. Parker-Hannifin filed its opposition to this motion on October 17, 1986, asserting therein for the first time that the five John Doe defendants destroyed diversity of citizenship.[6]

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6. Although Parker-Hannifin has also raised this issue concerning the effect of the inclusion of the five John Doe defendants in Kiser's amended complaint on diversity of citizenship in this appeal, to date this issue has not been addressed by the district court. Because Kiser, on remand, may seek leave further to amend her complaint as to these defendants, we decline to issue what may well be an advisory opinion on this issue.

Judge Becker would address this issue, believing that it potentially affects our jurisdiction, and he would dismiss the John Doe defendants on either of two theories. First, noting that John Doe defendants destroy diversity when their citizenship cannot truthfully be alleged, Pullman Co. v. Jenkins, 305 U.S. 534, 540 (1939); Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 30-32 (3d Cir. 1985), and further that the John Doe defendants named in Kiser's amended complaint are not indispensable parties, Judge Becker would follow the case law that authorizes their dismissal so as to preserve (diversity) jurisdiction. *See, e.g.*, Othman v. Globe Indem. Co., 754 F.2d 1458, 1467 (9th Cir. 1985). Second, Judge Becker would hold that John Doe defendants should be dismissed as a matter of course absent a showing by Kiser of why the Does are

On December 11, 1986, the district court denied Kiser's motion for reconsideration and affirmed the second dismissal order, noting that paragraph three of the July 11th stipulation mandated that the parties "*shall* have thirty (30) days from the date of July 2, 1986 conference within which to attempt to resolve [Kiser]'s claim that diversity jurisdiction is proper. The use of the word 'shall' indicates that the 30 day time limit was intended to be mandatory, not permissive." *Kiser v. Parker-Hannifin Corp.*, No. 85-6997, mem. op. at 4 (E.D. Pa. Dec. 11, 1986) (original emphasis). At the time of this final dismissal order, the district court again did not mention Kiser's then-renewed motion for leave to amend her complaint. Our appellate

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needed (a showing that he believes will rarely be made because it is unlikely that an unknown, unnamed defendant would be indispensable to the litigation). Judge Becker observes that the principal reason for John Doe pleadings is protection against the statute of limitations. Notwithstanding this rationale, Judge Becker believes that, in reality, the presence of John Does in the complaint is not likely to aid plaintiffs in avoiding statute of limitations problems. He notes that, absent state law to the contrary, a defendant who does not receive actual notice of a suit before the statute has run cannot later be brought into the litigation, even if that defendant was technically sued under a fictitious name. *See* Schiavone v. Fortune, ___ U.S. ___, 106 S. Ct. 2379, 2385 (1986) ("the linchpin [of Federal Rule of Civil Procedure 15(c)'s relation-back doctrine] is notice, and notice within the limitations period"); *cf.* Talbert v. Kelly, 799 F.2d 62, 66 n.1 (3d Cir. 1986) (dictum) (naming John Doe in complaint will not toll statute *even* if state law provides otherwise).

In sum, because a John Doe pleading is usually problematic and is no boon to anyone, Judge Becker would render John Doe defendants dismissible as a matter of course in federal diversity litigation. *See generally* **2A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 8.10** at 8-45 (2d ed. 1987) (absent "unusual circumstances . . . the practice [of pleading John Doe defendants] is unwarranted in diversity cases brought originally in the federal courts").

jurisdiction over this matter is conferred by 28 U.S.C. § 1291 (1982).

II.

The first question we must address is whether the district court erred when it failed to consider Kiser's motions for leave to amend her complaint prior to addressing Parker-Hannifin's motions to dismiss. The decision of a district court to grant or deny leave to amend is reviewed only for an abuse of discretion. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987); *Lewis v. Curtis*, 671 F.2d 779, 783 (3d Cir.), *cert. denied*, 459 U.S. 880 (1982); *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981), *cert. denied sub nom. F.D. Rich Housing of the Virgin Islands, Inc. v. Government of the Virgin Islands*, 455 U.S. 1018 (1982). Even after a responsive pleading has been filed, however, great liberality in allowing amendment of an initial pleading is often appropriate, especially when an amendment will further the ends of justice, effectuate presentation of a suit's merits and not prejudice the opposing party. *See generally Hirshorn v. Mine Safety Appliances Co.*, 101 F. Supp. 549, 552 (W.D. Pa. 1951), *aff'd*, 193 F.2d 489 (3d Cir. 1952). For these reasons, the Federal Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957). In addition, by federal statute, "[d]efective allegations of jurisdiction may be amended, upon

terms, in the trial or appellate courts." 28 U.S.C. § 1653 (1982). This statute applies in particular to amendments that affect a court's diversity jurisdiction, and it permits amendments broadly so as to avoid dismissal of diversity suits on technical grounds. *See Moore v. Coats Co.*, 270 F.2d 410, 412 (3d Cir. 1959). Accordingly, it is not only within the power, but it is a duty, of a federal court to consider on the merits a proposed amendment of a defective allegation once the court's attention is called to the defect. *See generally Howard v. De Cordova*, 177 U.S. 609, 614 (1900).

In this case, the district court did not *mention* Kiser's requests for leave to amend the complaint in either of its memorandum opinions. The only apparent reason for this effective denial of Kiser's requests was the parties' failure to resolve the diversity issue pursuant to paragraph three of the July 11th stipulation. *See Kiser*, No. 85-6997, mem. op. at 4 (E.D. Pa. Dec. 11, 1986); *Kiser*, No. 85-6997, mem. op. at 3-4 (E.D. Pa. Sept. 23, 1986). The district court erred, however, when it employed the stipulation to achieve such a drastic result. The stipulation's only mandate was that the parties *"shall . . . attempt"* to resolve Kiser's claim that diversity jurisdiction is proper. *Kiser*, No. 85-6997, stipulation & order at 1-2 (E.D. Pa. July 11, 1986). It did not direct that the parties, on pain of dismissal, shall *resolve* Kiser's claim that such jurisdiction is proper. We note that the record reveals that Kiser did make the required attempt, and we hold that the district court erred when it punished Kiser, by dismissing her complaint, for Parker-Hannifin's refusal to cooperate with her honest, albeit belated, efforts to allege a basis for the district court's jurisdiction.

Parker-Hannifin argues that Kiser had been given the time from February 13, 1986, to amend her complaint. This argument fails to take into account the

district court's February 12th statement that no response by Kiser to the dismissal motion was necessary. In addition, Rule 15(a) declares that a party may amend his or her pleading once as a matter of course at any time before a responsive pleading is served. Thereafter, a party may amend his or her pleading only by leave of court or by written consent of the adverse party. *See* Fed. R. Civ. P. 15(a). Because Kiser had amended her complaint on February 19, 1986, which was prior to the filing of Parker-Hannifin's answer on March 27, 1986, she was thereafter constrained by the mandate of Rule 15(a) from further amending her complaint as a matter of course. Finally, we note that "mere delay is not by itself enough to justify denial of leave to amend." *Sanders*, 823 F.2d at 217. The delay, to become a legal ground for denying a motion to amend, must result in prejudice to the party opposing the amendment, and it is the opposing party's burden to prove that such prejudice will occur. *See id.*

We are unable to envision any prejudice to Parker-Hannifin from the proposed amendment; because allowing this amendment should not affect Kiser's tactics or case theories, it will not cause Parker-Hannifin undue difficulty in preparing its defense. *See Sanders*, 823 F.2d at 217 ("The amendment [plaintiff] seeks would not alter the claims originally asserted in any way, thus no additional burden of defense would fall on [defendants]."); *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1969). The proposed amendment seeks merely to allege Parker-Hannifin's state of incorporation, a fact that Kiser bears the burden of proving at trial. The district court's action, which appears to lack any legal or practical basis, thus amounts to an outright refusal to grant Kiser leave to amend. Such an outright refusal, without

justification, is a clear abuse of discretion and is inconsistent with the spirit of the Federal Rules, *see Foman*, 371 U.S. at 182, especially where the motion for leave to amend the complaint is accompanied by an amended complaint that may properly be relied upon for relief. As in many of these cases, if Kiser's counsel had exercised greater diligence and had prepared an original complaint of the required specificity, the present problem never would have arisen. Lawyers -- who, like judges, operate under the pressures of time and demanding schedules -- sometimes, however, fall short of perfection. Recognizing this fact of legal life, Rule 15(a) was enacted to create an uncomplicated method by which pleadings may be amended without causing serious injustice.

III.

The second question before us is whether the district court properly dismissed Kiser's complaint. The dismissal of a complaint, by the district court, for failure adequately to allege jurisdiction is subject to plenary review. *See Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986). We conclude that the district court erred as a matter of law when it granted Parker-Hannifin's second motion to reinstate the June 9th dismissal order and denied Kiser's motion to reconsider. First, the district court's February 12th directive understandably dissuaded Kiser from opposing the initial motion to dismiss. In granting the motion to reinstate dismissal, the district court effectively reinstated what we regard as an inadvertent dismissal order. Second, the July 11th stipulation did not provide the district court with an adequate basis for dismissal. Instead, it merely permitted Parker-Hannifin to move for reinstatement, which is a far cry from providing that defendant with an

automatic right to dismissal. Finally, as we explained in the preceding section, Kiser's request for leave to amend the complaint should have been considered by the district court before it acted on Parker-Hannifin's motions to dismiss. Courts must be cautious in assessing motions to dismiss, particularly where granting such a motion would terminate the litigation before the parties have had their day in court. *See Vogelstein v. National Screen Serv. Corp.*, 204 F. Supp. 591, 595 (E.D. Pa.), *aff'd*, 310 F.2d 738 (3d Cir. 1962), *cert. denied*, 374 U.S. 840 (1963).

IV.

We must conclude by noting that Kiser has filed with this Court a document from the Secretary of the State of Ohio. It certifies that Parker-Hannifin is an Ohio corporation, was incorporated there on December 30, 1938 and has its principal location in Cleveland, Ohio. While this fact of course should have been pled by Kiser in her original complaint, we find it somewhat disturbing that counsel for Parker-Hannifin refuses even to acknowledge that the Ohio certificate accurately describes Parker-Hannifin's incorporation and place of business.[7] The district court's July 11th order placed Kiser in the precarious position of relying on Parker-Hannifin's good faith to stipulate the obvious fact of its own incorporation. By refusing to stipulate to what now appears to be the truth,

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7. We note the following statements from oral argument to this Court:

> THE COURT: [A]re you asserting before us that your client does not have [its] principal place of business in Ohio . . . . and [denying that] it's incorporated in Ohio?
>
> MR. O'BRIEN: I frankly don't know personally, Your Honor. . . . I can't assert that one way or another.

Parker-Hannifin was then in a position to preclude Kiser from amending the complaint, thereby unilaterally defeating her action. Such a procedure encourages gamesmanship, not candor with our courts, and cannot be sanctioned.

V.

For the foregoing reasons, we will dismiss the Doe defendants from Kiser's complaint, reverse the dismissal order of the district court and grant Kiser's motion for leave to amend her complaint.

THE COURT: You mean [that,] after all of this time[,] with all the counsel fees that have been paid in litigating this[,] that you don't know [if] -- [that you] have not made inquiry as to whether [--] your client is incorporated in Ohio and its principal place of business is in Ohio?

. . .

MR. O'BRIEN: No. I have not, Your Honor.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1023

KISER, ANNIE C. and
KISER, ANNIE C. as Administratrix of
the Estate of KISER, EVERETT W.

Appellant

v.

GENERAL ELECTRIC CORPORATION
PARKER-HANNIFIN CORPORATION and
EATON CORPORATION and
DOES 1-5

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil Action No. 85-6997)

Argued July 6, 1987

Before: HIGGINBOTHAM and BECKER,
Circuit Judges, and
BARRY, *District Judge*.*

(Filed October 14, 1987)

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* Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

ORDER AMENDING OPINION

It is ordered that the slip opinion of this Court filed October 14, 1987, be amended as follows:

(1) On page 7, footnote 6, in the fourth line of the final paragraph, the characters "2A" should appear in regular, not bold, typeface.

(2) On page 10, line 8, "Fed. R. Civ. P." should appear in bold typeface.

(3) On page 13, delete "dismiss the Doe defendants from Kiser's complaint." from section V.

BY THE COURT,

A. Leon Higginbotham

Circuit Judge

Dated: October 27, 1987

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 85-6997

ANNIE C. KISER and ANNIE C. KISER
as Administratrix of the Estate
of EVERETT W. KISER

v.

GENERAL ELECTRIC CORPORATION,
PARKER-HANNIFIN CORPORATION,
and EATON CORPORATION

MEMORANDUM OPINION AND ORDER

WEINER, J. DECEMBER 11, 1986

Plaintiff, a citizen of North Carolina, brought this action, alleging that the defendants do business in Pennsylvania. In a Memorandum Opinion and Order dated June 9, 1986, we granted the motions of defendants Eaton Corporation and Parker-Hannifin Corporation to dismiss since the complaint did not contain any allegations as to the place of incorporation and the principal place of business of the corporate parties for the purpose of establishing diversity jurisdiction under the diversity statute. In the same Memorandum Opinion and Order, we granted the motion of defendant General Electric Company to dismiss for failure of the plaintiff to file a brief in opposition within thirteen (13) days as provided by Local Rule 20. Following a telephone conference with all parties on July 2, 1986, the court adopted and entered as the order of the court on July 11, 1986, the following stipulation:

"1. The order dated June 9, 1986 marked as having been entered by the Clerk of the Court on June 11, 1986, granting the motions of the Eaton Corporation and Parker-Hannifin Corporation to dismiss is hereby vacated.

2. Plaintiffs hereby stipulate to the dismissal with prejudice of all claims asserted, or which could be asserted, against defendants Eaton Corporation and General Electric Company.

3. Plaintiffs and defendant, Parker-Hannifin Corporation shall have thirty (30) days from the date of July 2, 1986 conference within which to attempt to resolve plaintiff's claim that diversity jurisdiction is proper; in the event of a failure by plaintiffs and Parker-Hannifin Corporation to reach agreement on this issue, it is Stipulated and Agreed that defendant, Parker-Hannifin Corporation may move the Court upon the end of the said thirty (30) days period for reinstatement of the Order dismissing the Complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction and/or lack of properly pleading the existence of diversity jurisdiction.

4. Defendant, Parker-Hannifin Corporation shall decide within the aforementioned thirty (30) day period whether or not it will dismiss with prejudice all claims it has asserted or intends to assert against Eaton Corporation and General Electric Corporation; if Parker-Hannifin Corporation decides not to agree to such a dismissal, defendants Eaton Corporation and General Electric Company may file any Motion that they deem appropriate with respect to the said claims of Parker-Hannifin Corporation."

When the parties were unable to resolve the diversity issue within the thirdy day period, Parker-Hannifin Corporation, pursuant to paragraph three of the stipulation, filed a motion on August 28, 1986, to reinstate the

part of or Order of June 9, 1986 dismissing the complaint as to Parker-Hannifin Corporation. In a Memorandum Opinion and Order dated September 23, 1986, we reinstated that part of our Order dated June 9, 1986 dismissing the complaint as to Parker-Hannifin Corporation.[1] We based our decision on the fact that since the parties were unable to resolve the diversity issue by August 2, 1986, we were unable to establish jurisdiction under the diversity statute. Presently before the court is the motion of plaintiff for reconsideration of our Order of September 23, 1986 dismissing the complaint as to Parker-Hannifin Corporation. After careful reconsideration, we affirm our Memorandum Opinion and Order of September 23, 1986.

In support of her motion for reconsideration, plaintiff makes the following assertions:

"1. Between July 11, 1986 and August 2, 1986 plaintiff's counsel and counsel for defendant, Parker-Hannifin, agreed that defendant's counsel would attempt to obtain the consent of his client for plaintiff to amend her complaint to allege defendant's place of incorporation.

2. As of August 2, 1986 defense counsel had not received a definite answer from his client on this question. Plaintiff's counsel informed defense counsel that she would be on vacation during the month of August and defense counsel assured her that, during that time, he would continue to attempt to obtain the Stipulation from his client and would not move to reinstate the Order of Dismissal. Counsel also agreed that out of an abundance of caution, it would be a good idea for plaintiff to file a Notice of Appeal in case the reinstatement was done automatically.

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1. Plaintiff took an appeal from our Order of September 23, 1986 to the United States Court of Appeals for the Third Circuit. In an Order dated September 9, 1986, the Court of Appeals dismissed the case for failure to order a transcript of the proceedings in the lower court as required. The case was not remanded to this court.

3. When plaintiff returned from vacation on approximately August 26, 1986, she was informed by counsel for defendant, Parker-Hannifin that his client would not stipulate to the requisite amendment and that he was moving to reinstate the Court's order. Plaintiff then filed an opposition to said motion and asked the Court for leave to amend her complaint.

4. Had plaintiff's counsel known prior to August 2, 1986, that Parker-Hannifin would not stipulate to an amendment, counsel would have moved to amend the complaint prior to August 2, 1986. However, in the hopes that a formal motion to the Court would be unnecessary, and relying on the good faith of Parker-Hannifin's counsel, plaintiff refrained from making such a motion."

However meritorious those assertions may be, they do not persuade us to vacate our Order of September 23, 1986. We note that paragraph three of the stipulation which was entered as the order of the court on July 11, 1986, specifically states that the parties "*shall* have thirty (30) days from the date of July 2, 1986 conference within which to attempt to resolve plaintiff's claim that diversity jurisdiction is proper." (emphasis added). The use of the word "shall" indicates that the 30 day time limit was intended to be mandatory, not permissive. Since plaintiff brought this action the burden was on her to establish diversity jurisdiction over Parker-Hannifin Corporation by the August 2, 1986 deadline. The court believes it was more than lenient in approving what amounted to a 30-day grace period in which the plaintiff could correct her complaint by pleading the state of incorporation of Parker-Hannifin. However, she failed to do so.

Plaintiff asserts as a reason for not having complied with the August 2, 1986 deadline that as of August 2, 1986, defense counsel indicated that he had not received a definite answer from his client as to whether his client would consent to plaintiff amending her complaint to

allege defendant's place of incorporation. Defendant denies this assertion and states that he advised plaintiff's counsel on August 5, 1986 that his client would not agree to a stipulation. If plaintiff wanted additional time to resolve the diversity issue, she should have filed a motion with the court for an extension of time. Since we are still unable to establish jurisdiction under the diversity statute over defendant Parker-Hannifin Corporation, we affirm our Memorandum Opinion and Order of September 23, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 85-6997

ANNIE C. KISER and ANNIE C. KISER
as Administratrix of the Estate
of EVERETT W. KISER

v.

GENERAL ELECTRIC CORPORATION,
PARKER-HANNIFIN CORPORATION,
and EATON CORPORATION

ORDER

After careful reconsideration, we AFFIRM our Order of September 23, 1986 dismissing the complaint as to defendant Parker-Hannifin Corporation.

IT IS SO ORDERED.

CHARLES R. WEINER

No. 87-1175

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PARKER-HANNIFIN CORPORATION,
Petitioner,

v.

ANNIE C. KISER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Appeal No. 87-1023)

RESPONDENT'S BRIEF IN OPPOSITION

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(415) 391-3400
Counsel for Respondent

February 18, 1988

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

13pp

QUESTION PRESENTED

The sole question actually presented is this: Whether the Court of Appeals properly determined that the district court erred in dismissing the action without considering plaintiff's motions to amend her complaint to remedy an incomplete statement of diversity jurisdiction.

The questions asserted by petitioner are part of the "gamesmanship" and lack of "candor with our courts" noted by the Court of Appeals (831 F.2d 423, 429). The court below did *not* sanction any federal Doe practice. On the contrary, the Court of Appeals authorized respondent to seek leave to amend her complaint as to the Doe defendants, reversed the dismissal order and remanded with directions to grant Kiser's motion to amend her complaint to allege petitioner's state of incorporation as Ohio.

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No. 87-1175

In the Supreme Court

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OCTOBER TERM, 1987

PARKER-HANNIFIN CORPORATION,
Petitioner,

v.

ANNIE C. KISER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Appeal No. 87-1023)

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Annie C. Kiser, individually and as Administratrix of the Estate of Everett W. Kiser, submits that the petition for writ of certiorari should be denied for the reasons set forth below.

JURISDICTION

The jurisdiction of the district court was based on diversity of citizenship. 28 U.S.C. § 1332. The first amended complaint (Appendix 26a, cited as "App.") alleged that: Plaintiff Kiser is a citizen of North Carolina and was appointed administratrix of her husband's estate in North Carolina. Defendant General Electric (since dismissed) is a corporation with its principal place of business in Connecticut. Defendant Parker-Hannifin (petitioner)

and defendant Eaton (since dismissed) are each corporations with their principal places of business in Ohio.

The one omission was the failure to state the places of incorporation of the defendants, although it was alleged that none was incorporated in North Carolina. App. 160a. Petitioner Parker-Hannifin is the sole remaining defendant and, as noted in the opinion below (831 F.2d 423, 428), petitioner is incorporated in Ohio.

Through the inadvertent use of routine California practice,* the first amended complaint added "DOES 1-5" in the caption. App. 26a. The fictitious defendants were not otherwise mentioned except to state that they were not incorporated in and did not have their principal place of business in North Carolina. App. 27a. As noted in the opinion below (831 F.2d at 426), the Doe defendant issue was not raised in the district court until after dismissal of the action. App. 154a. The dismissal did not mention any Doe issue. App. 124a-128a. Nor did the district court mention that issue in denying reconsideration. App. 172a-176a. The Court of Appeals initially granted Kiser's request to dismiss the Doe defendants. The opinion was then modified to simply allow respondent to seek that relief in the district court. (831 F.2d at 426, fn. 6.)

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 inasmuch as the district court dismissed the complaint as to the sole remaining defendant and also refused to consider plaintiff's applications for leave to amend.

The Supreme Court may review the judgment by writ of certiorari. 28 U.S.C. § 1254. The only issue, however, is whether the Court of Appeals properly held that the district court should not have dismissed the action without allowing, or even considering, leave to amend the complaint.

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* Petitioner's assertions (Petn. 7) about problems, defenses, immunities, naming the wrong defendant and frivolousness reflect the "gamesmanship" decried by the court below; they are not based on the record.

STATUTES INVOLVED

The only statute involved is 28 U.S.C. § 1653, providing that: "Defective allegations of jurisdiction may be amended, upon terms, in the trial and appellate courts." Denial of leave to amend without "any apparent or declared reason" is not an exercise of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Also relevant is Rule 15, Fed.R.Civ.Proc., mandating that leave to amend pleadings "shall be freely given when justice requires." The federal rules thus reject "the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

STATEMENT OF THE CASE

The record is correctly stated in the opinion below (831 F.2d at 424-426) and is briefly summarized from that opinion:

A. The Action.

This action was brought by the parents of Tony W. Kiser, deceased, to recover damages for his allegedly wrongful death. The initial complaint, filed December 5, 1985, alleged that the decedent, while on active duty as a fireman in the United States Navy, was killed on February 23, 1984, aboard the U.S.S. Guam, which was then stationed in the Mediterranean Sea off the coast of Lebanon. He died from injuries allegedly caused by the failure and malfunction of certain component parts of a hatch that allegedly had been manufactured by the defendants, sold to the Navy and installed on the Guam.

B. Motions to Dismiss.

The initial complaint inadequately alleged the basis of diversity jurisdiction. On February 6, 1986, then-defendant Eaton Corporation moved to dismiss the action for that reason. Petitioner Parker-Hannifin joined in that motion.

C. Deferral of Motions.

On February 12, 1986, the district court held a telephone conference with counsel during which counsel for respondent Kiser was informed that, pending further notice from the court, the pending motions of Eaton and petitioner require no immediate response.

D. Initial Dismissal Notwithstanding Deferral.

On February 19th respondent filed an amended complaint alleging that petitioner was not a North Carolina corporation but failing to specifically allege that petitioner was incorporated in Ohio. The amended complaint inadvertently added Does 1-5. Petitioner filed its answer on March 27, 1986. Notwithstanding the court's direction that respondent could defer any response to the pending motions, the district court thereafter granted the motions to dismiss of Eaton and petitioner for insufficient jurisdictional allegations.

E. Stipulation and Order Vacating Dismissal.

By letter of June 24, 1986, respondent's counsel asked the district court to vacate its dismissal order, referring to the court's February 12th directive deferring consideration of the motions to dismiss. Another telephone conference with counsel and the court resulted in an order vacating the dismissal order of June 9th and a stipulation to dismiss Eaton and then-defendant General Electric.

The stipulation and order further provided (in paragraph 3) that respondent and petitioner shall have thirty (30) days in which to attempt to resolve the claim that diversity jurisdiction is proper; and in the event they failed to agree, "Parker-Hannifin Corporation may move the Court upon the end of the said thirty (30) day period for reinstatement of the Order dismissing the Complaint as to Parker-Hannifin Corporation for lack of diversity jurisdiction and/or lack of properly pleading the existence of diversity jurisdiction."

F. Renewal of Motion.

Respondent's counsel then attempted to obtain consent to amending the complaint to allege that petitioner's state of incorporation is Ohio. On August 28, 1986, petitioner moved to reinstate the June 9th dismissal order. Respondent filed opposition to this motion and requested leave to amend her complaint.

G. Second Dismissal.

On September 23, 1986, the district court granted petitioner's motion on the basis of paragraph 3 of the stipulation. As noted in the opinion below (831 F.2d at 426), the court did not mention and, thus, apparently did not consider, respondent's then pending request for leave to amend her complaint.

H. Renewal of Application for Leave to Amend.

On October 8, 1986, respondent moved for reconsideration of the second dismissal order and again moved for leave to amend her complaint. This motion was accompanied by a proposed second amended complaint stating that petitioner is an Ohio corporation. [As the opinion notes (831 F.2d at 429, fn. 7), petitioner's counsel professed ignorance of this fact even at the oral argument in the Court of Appeals.] Petitioner opposed this motion, asserting for the first time that the Doe defendants destroyed diversity of citizenship.

I. Denial of Reconsideration and Leave to Amend.

On December 11, 1986, the district court denied respondent's motion for reconsideration and affirmed the second dismissal order, basing its ruling on a misreading of the stipulation as mandating dismissal absent a stipulation for leave to amend. The final dismissal order did not mention respondent's renewed motion for leave to amend her complaint.

REASONS FOR DENYING THE WRIT

I

THE SOLE ISSUE IS THAT OF REFUSAL TO CONSIDER LEAVE TO AMEND THE COMPLAINT

The "gamesmanship" deplored by the Court of Appeals (831 F.2d at 429) is carried to extremes in the petition. There is no issue about the propriety of Doe pleadings in federal courts. Respondent does not claim, and the court below did not hold, that Doe pleadings are permissible. All these contentions about federal practice and Doe allegations (Petn. pp. 9-11) are sham.

Only two questions were presented to and decided by the court below. One question was "whether the district court erred when it failed to consider Kiser's motions for leave to amend her complaint prior to addressing Parker-Hannifin's motions to dismiss." 831 F.2d at 426. The decision was that the court's "outright refusal to grant Kiser leave to amend" was "without justification" and "is a clear abuse of discretion and is inconsistent with the spirit of the Federal rules, *see Foman*, 371 U.S. at 182, especially where the motion for leave to amend the complaint is accompanied by an amended complaint that may properly be relied upon for relief." 831 F.2d at 428.

The second question was "whether the district court properly dismissed Kiser's complaint." 831 F.2d at 428. The Court of Appeals concluded "that the district court erred as a matter of law when it granted Parker-Hannifin's second motion to reinstate the June 9th dismissal order and denied Kiser's motion to reconsider." 831 F.2d at 428.

The court below did not suggest that there is any basis in the federal rules, or otherwise, for Doe practice or pleadings. On the contrary, the court authorized respondent to seek leave to amend to dismiss the Doe defendants. The opinion below also noted the view of Judge Becker that Doe defendants should be "dismissable as a matter of course in federal diversity litigation." 831 F.2d at 426, fn. 6.

The assertion that the district court "gave the plaintiffs several opportunities to amend their complaint" (Petn. p. 13) is another "gamesmanship" gambit. Respondent was given *no* opportunity

to amend. Having once amended, respondent could not amend again without leave of court and the district court refused to even consider respondent's applications. 831 F.2d at 427.

II

REFUSAL TO CONSIDER LEAVE TO AMEND WAS AN ABUSE OF DISCRETION

The court below properly applied the federal rules (Fed.R.Civ.Proc., Rule 15) and the federal statute (28 U.S.C. § 1653) in holding that it was an abuse of discretion to refuse to even consider respondent's motions for leave to amend her complaint to remedy the minor flaws therein. As noted in *Foman v. Davis, supra*, 371 U.S. 178, 182:

> "... but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

The question is *not* one of subject matter jurisdiction. Petn. p. 11. The question, rather, is one of *amending* the complaint to allege the *true* jurisdictional facts. The statute (28 U.S.C. § 1653) expressly authorizes such amendments.

III

THERE IS NO CONFLICT WITH THE BRYANT DECISION

There is no conflict in the circuits, and particularly no conflict with the decision in *Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987), concerning federal Doe practice. The opinion below does *not* sanction any such practice. On the contrary, the Court of Appeals initially dismissed the Doe defendants at the request of respondent and thereafter modified the opinion to allow respondent to seek that relief in the district court.

Bryant simply held that removal of a state court action was premature because the complaint contained Doe defendants as parties. 832 F.2d at 1084. There *the defendant* sought to invoke

federal diversity jurisdiction notwithstanding that plaintiff did not seek dismissal of the Does. In contrast, federal jurisdiction was here invoked *by the plaintiff* and, having added Doe defendants through routine California practice, the plaintiff sought to retain federal jurisdiction by voluntary dismissal of the Does. *Bryant* expressly recognizes that federal jurisdiction would exist upon such dismissal. The Ninth Circuit held that "the 30-day time limit for removal contained in 28 U.S.C. § 1446 will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court." 832 F.2d at 1083.

The Doe defendants in this case were inadvertently added and have been "unequivocally abandoned by the plaintiff." There is, thus, no conflict with *Bryant*.

CONCLUSION

There is no reason for granting certiorari to review the simple question of whether the district court abused its discretion in refusing to even consider respondent's requests for leave to amend the complaint to cure minor flaws in the jurisdictional allegations. No other question is presented. The Court of Appeals did not purport to sanction any federal Doe practice. There is no conflict between the circuits. As *Bryant* itself recognizes, federal diversity jurisdiction, if otherwise present, will attach when the Doe defendants are "unequivocally abandoned by the plaintiff." The Doe defendants were inadvertently added and have been "unequivocally abandoned." The petition should therefore be denied.

Respectfully submitted,

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